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9-5-74
CR6-128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-5149

MICHAEL J. CASSIUS,
Appellant-Petitioner,

-vs-

STATE OF ARIZONA,
Appellee-Respondent.

ORIGINAL COPY

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

W. WARNER LEE
The Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division
159 State Capitol Building
Phoenix, Arizona 85007

Attorneys for APPELLEE-
RESPONDENT

I N D E X

	Page
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED	2
STATEMENT OF FACTS	3
REASONS WHY THE WRIT SHOULD NOT ISSUE	
I PETITIONER'S CONVICTION FOR THE SECOND AND SEPARATE OFFENSE OF COMMITTING A FELONY WHILE ON OR RELEASE DID NOT SUBJECT HIM TO DOUBLE JEOPARDY.	4
II THE STATE OF ARIZONA HAS A RATIONAL BASIS FOR ENACTING ARIZ.REV.STAT.ANN. § 13-1580 (CUM.SUPP. 1973) AS IT FURTHERS A LEGITIMATE STATE PURPOSE.	7
CONCLUSION	9

TABLE OF CASES AND AUTHORITIES

Cases	Page
Benton v. Maryland 395 U.S. 784 89 S.Ct. 2056 23 L.Ed.2d 707 (1969)	4,5
Blockburger v. United States 284 U.S. 299 52 S.Ct. 180 76 L.Ed. 306 (1932)	6
Callanan v. United States 364 U.S. 587 81 S.Ct. 321 5 L.Ed.2d 312 (1961)	6
Carter v. McClaughry 183 U.S. 367 22 S.Ct. 181 46 L.Ed. 236 (1902)	6
Fuller v. Oregon U.S. 94 S.Ct. 2116 40 L.Ed.2d 642 (1974)	8
Gavieres v. United States 220 U.S. 338 31 S.Ct. 421 55 L.Ed. 489 (1911)	6
Gore v. United States 357 U.S. 386 78 S.Ct. 1280 2 L.Ed.2d 1405 (1958)	6
McGinnis v. Royster 410 U.S. 263 93 S.Ct. 1055 35 L.Ed.2d 282 (1973)	8
Moore v. Missouri 159 U.S. 673 16 S.Ct. 179 40 L.Ed. 301 (1895)	5,7,8
Oyler v. Boles 368 U.S. 448 82 S.Ct. 501 7 L.Ed.2d 446 (1962)	7
San Antonio Independent School District v. Rodriguez 411 U.S. 1 93 S.Ct. 1278 36 L.Ed.2d 16 (1973)	7,8

TABLE OF CASES AND AUTHORITIES

Case	Page
Spencer v. Texas 385 U.S. 554 87 S.Ct. 648 17 L.Ed.2d 606 (1967)	7
State v. Cassius 110 Ariz. 485 520 P.2d 1109 (1974)	4,7,8
State v. Cassius 21 Ariz.App. 78 515 P.2d 903 (1973)	4
United States v. Pacelli 470 F.2d 67 (2nd Cir., 1972)	6

AUTHORITIES

Ariz.Rev.Stat.Ann.	
§ 13-302 (Cum.Supp. 1973)	2,3,5,6
§ 13-1580 (Cum.Supp. 1973)	2,3,4,5,6,7,8,9
United States Constitution	
Fifth Amendment	5
Fourteenth Amendment	4,5,9

JURISDICTION

Respondent, for the purposes of this response, accepts petitioner's statement of these issues.

QUESTIONS PRESENTED

I. WHEN BOTH OFFENSES AROSE OUT OF THE SAME TRANSACTION, MAY PETITIONER BE PUNISHED BOTH FOR COMMITTING A BURGLARY [ARIZ.REV.STAT.ANN. § 13-302 (Cum.Supp. 1973)] AND FOR COMMITTING IT WHILE ON RELEASE PENDING ANOTHER CHARGE [ARIZ.REV. STAT.ANN. § 13-1580 (Cum.Supp. 1973)] WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BECAUSE THE ELEMENTS OF THE TWO OFFENSES ARE DIFFERENT?

II. DOES THE STATE OF ARIZONA HAVE A RATIONAL BASIS FOR ENACTING ARIZ.REV.STAT.ANN. § 13-1580 (Cum.Supp. 1973) AND MAKING IT A SEPARATE OFFENSE?

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution Amendment Five:

> " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * "

Ariz.Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973):

> "A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance. Added Laws 1972, Ch. 126, § 1."

STATEMENT OF FACTS

On October 17, 1972, petitioner was arrested and charged with burglary. Although on parole from California, where he had been previously convicted of burglary, he was released on his own recognizance. (See R.T., at 12, January 4, 1973). This first offense was assigned Case Number A-22479.

While released on his own recognizance (OR release) on the first Arizona charge, on November 4, 1972, petitioner was arrested in the progress of committing a night time commercial burglary (R.T., at 7, January 4, 1973). Petitioner was charged with two counts: Count I, first degree burglary [Ariz.Rev.Stat. Ann. § 13-302 (Cum.Supp. 1973)], and Count II, committing a felony while on OR release pending another felony charge [Ariz. Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973)]. Both these offenses were assigned Case Number A-22303.

The prosecutor and public defender negotiated a plea agreement which was accepted by the court on January 4, 1973. In accordance with the plea agreement the first burglary charge was dismissed entirely (Case Number A-22479). In return the petitioner admitted and pled guilty to the second burglary offense in Count I of the second case (Case Number A-22303) and Count II, the offense of committing a felony while on OR release pending a separate felony charge, was submitted to the court on stipulated facts. The stipulated facts were: (1) The first charge, which was dismissed, had been a felony; (2) At the time petitioner committed the second burglary, he was on OR released pending trial for the first burglary; (3) The second offense, the burglary, was in fact a felony; and (4) Petitioner would plead guilty to the second offense (R.T., at 2-5, January 4, 1973). After accepting the guilty plea to the second burglary, the court based upon the stipulated facts found petitioner guilty of the second offense, committing a felony while on his own

recognizance (R.T., at 10, January 4, 1973).

Considering the fact that petitioner cooperated with the police and cleared 12-15 burglary cases for them, the court sentenced him to not less than one nor more than two years for the burglary offense and to a consecutive term of not less than one nor more than three years for the second offense of committing a felony while on OR release (R.T., at 16-18, January 23, 1973). Petitioner appealed from the judgment, but restricted his appeal to the conviction under Ariz.Rev.Stat.Ann. § 13-1580, committing a felony while on OR release. The Arizona Court of Appeals did not consider petitioner's allegation of Double Jeopardy. It held that the double jeopardy issue had not been preserved for appeal. State v. Cassius, 21 Ariz.App. 78, 515 P.2d 903, 905 (1973). However, sua sponte, the court raised the issue of equal protection, and then held that the statute violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. Id. 515 P.2d at 907.

The Arizona Supreme Court granted a Petition for Review by the State. The Court considered both the claim of double jeopardy and the claim of denial of equal protection.

The Court found both claims to be without merit and on April 16, 1974 vacated the Court of Appeals decision and affirmed petitioner's conviction. State v. Cassius, 110 Ariz. 485, 520 P.2d 1109 (1974). Petitioner's Motion for Rehearing was denied on May 21, 1974.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I

PETITIONER'S CONVICTION FOR THE SECOND AND SEPARATE OFFENSE OF COMMITTING A FELONY WHILE ON OR RELEASE DID NOT SUBJECT HIM TO DOUBLE JEOPARDY.

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d

707 (1969) held that the Double Jeopardy Clause of the Fifth Amendment was binding on the states under the Fourteenth Amendment to the United States Constitution.

The clause reads " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * " (emphasis supplied).

Normally the issue would then be: Was petitioner convicted of the same offense twice? For the double jeopardy clause is only applicable when a person is twice put in jeopardy for the same offense. Moore v. Missouri, 159 U.S. 673, 16 S.Ct. 179, 40 L.Ed. 301 (1895).

But here petitioner admits that Ariz.Rev.Stat.Ann. § 13-302 and § 13-1580 are separate offenses. "It is important to note that section 13-1580 creates a separate offense and does not merely provide for an augmentation of punishment." (Petition for Writ of Certiorari, at 5).

Petitioner then argues policy reasons why the State under its police powers should not be allowed to define this crime, e.g.: it permits the prosecutor full discretion in deciding to charge or not; that it presumes the person more culpable who commits a felony while on OR release than one who commits the same felony when not on OR release; that a court can order a person released on OR thus forcing him to be subjected to this offense, that somehow the offense violates the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution, etc. (Petition for Writ of Certiorari, at 5-7.)

It is submitted that this is a blunderbust attempt by petitioner to justify an untenable position. And on these facts such an argument is both a blunder and a bust.

Since at least the turn of the century, the test for double jeopardy under the United States Constitution has remained pristine in application: "offenses for the purpose of double

jeopardy must be the same in law and in fact." United States v. Pacelli, 470 F.2d 67, 72 (2nd Cir., 1972). Apparently, this mirror element test was first announced by this Court in Carter v. McClaughry, 183 U.S. 367, 22 S.Ct. 181, 46 L.Ed. 236 (1902):

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."
>
> Id. 183 U.S. at 395 (emphasis supplied).

Accord, Callanan v. United States, 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961); Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958); Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); and Gavieres v. United States, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1911).

While it is true petitioner's single act was an offense against both Ariz.Rev.Stat.Ann. § 13-302 (Cum.Supp. 1973) and Ariz.Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973) these are not the same offenses in both law and fact. In order to have convicted the petitioner of both offenses, the state had to be prepared to prove:

Ariz.Rev.Stat.Ann. § 13-302 (Cum.Supp. 1973):

A. Petitioner entered unlawfully a building, dwelling, etc.

B. He entered with the intent to commit a grand or petty theft, or a felony.

C. To prove the first degree burglary, the state must further prove petitioner performed the burglary at night.

But to prove commission of a felony while on OR release,

the proof would have to reflect the type of facts stipulated to by the petitioner in this case (R.T., at 3-5, January 7, 1974).

Ariz.Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973):

> A. Petitioner had been charged with a felony and released on bail OR release.
>
> B. That while on release he committed a crime.
>
> C. That the crime was a felony, and
>
> D. That he was convicted of this second felony.

In reviewing this and rejecting petitioner's argument that these are not separate elements, the Arizona Supreme Court correctly stated:

> "The fallacy of defendant's argument on the issue of double jeopardy is that we are not, in the instant case, dealing with the same offense . . . These offenses are entirely different."
>
> * * *
>
> "It is quite obvious that the two offenses with which defendant was charged have no common element."

Cassius, supra, at 520 P.2d 1110, 1111 (emphasis added).

Cf. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); and Moore v. Missouri, supra.

II

THE STATE OF ARIZONA HAS A RATIONAL BASIS FOR ENACTING ARIZ.REV.STAT.ANN. § 13-1580 (CUM.SUPP. 1973) AS IT FURTHERS A LEGITIMATE STATE PURPOSE.

Petitioner neither alleges that the right to commit a felony is a fundamental right, nor that persons charged with felonies are members of a suspect class subject to invidious discrimination, therefore the only issue is: Is the state's unequal treatment in furtherance of some rational, legitimate state purpose? San Antonio Independent School District v. Rodriguez, 411 U.S. 1,

55, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); and Virginian R. Co. v. System, 410 U.S. 263, 270, 276, 93 S.Ct. 1052, 35 L.Ed.2d 282 (1973).

As long ago as 1895, this Court stated:

> "The general doctrine [equal protection] is that the amendment [14th.], in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the state to protect the lives, liberty, or property of its citizens, . . ."
>
> Moore, supra, at 159 U.S. 678 (emphasis supplied).

The people of Arizona acting through their legislature had every right to attempt to deter further crime by persons on release and who were already pending a felony trial. The Arizona Supreme Court answered the equal protection argument saying:

> "While it is true that the right to bail has a constitutional basis, it has always been recognized that limitations may be imposed upon it. Generally bail is granted on condition that the defendant stay within the court's jurisdiction and that he conduct himself as a law-abiding citizen . . . . [M]erely requiring that a man abide by the law is not a chilling limitation; it is a requirement that he is obliged to follow whether or not on bail . . ."
>
> Cassius, supra, at 520 P.2d 1112.

This Court has recently reaffirmed the propositions that:

> "[L]egislative solutions must be respected if the 'distinction drawn have some basis in practical experience,' . . ., or if some legitimate state interest is advance, . . ."
>
> Royster, supra, at 410 U.S. 276.

Cf. Fuller v. Oregon, ___U.S. __, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

It is submitted that the rational basis behind Ariz.Rev.

Stat.Ann. § 13-1580 falls with the right of the state to "protect the lives, liberty, or property of its citizens" and thus not violative of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Based on the foregoing precedents and reasons, respondent respectfully submits that Ariz.Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973) is not violative of the United States Constitution. The Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

N. WARNER LEE
The Attorney General of
the State of Arizona

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

Attorneys for APPELLEE-RESPONDENT